Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Acceleration of Broadband Deployment:	)	
Expanding the Reach and	)	
Reducing the Cost of	)	WC Docket No. 11-59
Broadband Deployment by Improving	)	
Policies Regarding Public Rights of Way	)	
and Wireless Facilities Siting	)	

REPLY COMMENTS OF THE CITY OF SAN ANTONIO, TEXAS

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The City of San Antonio, Texas ("City" or "San Antonio"), files these reply comments in response to the opening comments filed in the Commission's Notice of Inquiry ("*NOI*"), 26 FCC Rcd 5384, released April 7, 2011, in the above-captioned proceeding.

San Antonio supports the reply comments of the National League of Cities, *et al.* (collectively, "NLC"), and the Texas Municipal League, as well as the reply comments of other local government interests filed in this proceeding. The City supplements those comments as follows.

INTRODUCTION AND SUMMARY

Opening comments opposing any preemptive or interpretive Commission action with respect to Section 253 or Section 332 (c)(7) outnumbered those favoring any such action by an overwhelming margin of about 15 to 1. As expected, industry members were the ones that urged a need for Commission action. But their arguments are flawed in several respects.

First and foremost, industry can draw no link between supposedly burdensome local right-of-way ("ROW") or zoning requirements, on the one hand, and broadband deployment, on the other. (Broadband deployment is, after all, the subject of the *NOI*.) In fact, the record overwhelmingly and unequivocally shows there is no such link: Broadband, in both wireline and wireless forms, is widely deployed in major urban and suburban areas where ROW compensation and zoning requirements are the most rigorous, and far less deployed in more rural areas where local ROW and zoning requirements are less rigorous or even non-existent.[1] The conclusion is obvious: Any further preemption of local right-of-way compensation or zoning requirements, beyond the case-by-case court adjudication that has occurred pursuant to Sections 253 and 332(c)(7), would do nothing to promote broadband deployment in the areas that need it. It would instead merely provide one industry with favored, windfall protection from local laws with which other industries must comply, while leaving rural areas no better off in terms of broadband deployment than they are now. This same pattern – greater broadband deployment in areas with more rigorous right-of-way compensation and zoning requirements and lesser broadband deployment in areas with less rigorous right-of-way compensation and zoning requirements – also proves that other cost and demand factors play a far greater role in broadband deployment and adoption than local right-of-way or zoning requirements, and thus that the Commission would better achieve its goals by focusing on those other cost and demand factors rather than paying heed to the telecommunications industry's self-serving pleas for special and privileged protection from local laws.

Second, industry commenters offer only isolated, unverified anecdotes of supposed problems with local right-of-way or zoning requirements – an anecdotal total that, even if accepted as accurate (and as the record reveals, they are not), pales in comparison to the total number of local governments nationwide and the massive proliferation of wireless facilities and landline broadband deployment that has taken place since Section 253 and 332(c)(7) were

[1] *See, e.g.*, San Antonio Comments at 5-8; Eugene Comments at 6-9; League of Kansas Municipalities ("LKM") Comments at 6-9; Comments of National League of Cities *et al.* ("NLC Comments") at 7-16.

enacted in 1996. In short, industry commenters offer nothing to suggest that the court remedies furnished by § 253 and § 332(c)(7) have not been, and will not be, fully adequate to protect against any abuses.

Third, the anecdotes of supposed abuses that industry does provide are inaccurate or misleading – in some cases, so egregiously so as to raise a question about the industry commenters' good faith in making them.[2] In these reply comments, the City will focus only on some of industry's most egregious legal and factual claims about Sections 253 and 332(c)(7). Industry commenters take inconsistent positions about ROW compensation and local zoning requirements, and they mischaracterize the language of Sections 253 and 332(c)(7), their legislative histories, and precedent construing them. The facts and law point to but one conclusion: There is no reasoned basis for any Commission action in this proceeding.

I. THE RECORD CONFIRMS THAT RENT-BASED RIGHT-OF-WAY COMPENSATION MECHANISMS DO NOT DETER BROADBAND DEPLOYMENT AND ARE CONSISTENT WITH SECTION 253.

Industry commenters voice various complaints about supposedly "excessive" ROW fees, and some claim that Section 253 forbids all ROW fees that are not based on, or equal to, a locality's ROW maintenance costs associated with the ROW user's facilities.[3] But their claims not only fail to come to grips with the record evidence that broadband deployment is unrelated to ROW compensation;[4] they also are factually and legally flawed.

[2] *See, e.g.*, NLC Reply Comments; Comments of the City of Wichita, Kansas; Comments of County of York, Virginia; City of Eugene, Oregon, Reply Comments.
[3] *See, e.g.*, CenturyLink Comments at 5-9; Verizon Comments at 17-21 and 24-25; Level 3 Comments at 7-14; NextG Comments at 13-16.
[4] *See* note 1 *supra*.

A. What Industry Really Wants Is Subsidized Access to Public Right-of-Way.

Industry commenters make anecdotal complaints about supposedly "excessive" ROW fees, but aside from their sporadic and largely unverified nature, these complaints are in many cases inaccurate and in many ways inconsistent. And they all ignore the over-arching fact that dooms their claims: Broadband deployment is actually greater in the major urban and suburban areas, where ROW compensation tends to be higher.[5]

CenturyLink (at 5), for instance, points to a Texas Municipal League document that states that ROW fees "constitute nearly ten percent of many Texas cities' general revenues." San Antonio agrees that ROW fees are a significant – and vitally important – source of municipal revenue.[6] But CenturyLink overlooks that in Texas, local telecommunications ROW fees are based on access lines and capped by state law.[7] More to the point, CenturyLink ignores the key fact relevant to this proceeding: Broadband deployment is high in San Antonio and other major metropolitan areas in Texas where providers pay the most in ROW fees, and low in unincorporated rural areas where no ROW fee is imposed.[8] And finally, CenturyLink overlooks the built-in check against imposition of excessive ROW fees by local governments: the voters, who see the ROW fee itemized on their bills.[9]

Industry commenters also reveal striking inconsistencies about what industry really wants when it comes to ROW compensation. Most commenters believe that predictability and

[5] In a rational market, one would expect ROW compensation to be higher in urban and suburban markets, because ROW, like real estate, is a more valuable property there, and because labor and other input costs tend to be higher in these areas as well.

[6] San Antonio Comments at 4-5.

[7] Tex. Local Govt. Code Ann., §§ 283.001 *et seq.* (2009).

[8] San Antonio Comments at 6-8.

[9] San Antonio Comments at 10-11; Eugene Comments at 9-10; LKM Comments at 9-10. *See Charter Communications v. County of Santa Cruz*, 304 F.3d 927, 935 (9th Cir. 2002) ("methods exist to promote self-correction in the future: citizens can vote out their local representatives").

uniformity in ROW compensation across jurisdictions are most important.[10] Yet Level 3 (at 9) inconsistently complains about localities' use of "strikingly similar" ROW compensation "methodology[ies] or fee[s]."

But industry commenters also want ROW compensation to be limited to some sort of ROW cost recovery,[11] and/or to "fair market value."[12] For reasons stated elsewhere, San Antonio believes it is clear that "fair and reasonable" ROW compensation under Sections 253(c) is *not* limited to costs, and that fair market value is an appropriate measure of "fair and reasonable" ROW compensation.[13] The relevant point here, however, is that whatever may be said of cost-based ROW compensation methodologies, or of compensation methodologies based on an appraisal at the fair market value of an individual right-of-way, one thing can be said about both methods: They will *not* result in uniformity or predictability in ROW compensation from jurisdiction to jurisdiction. The reason: ROW costs and ROW appraisals will inevitably vary – and often considerably – from jurisdiction to jurisdiction, and even from street to street.[14] And using either method will impose considerable additional costs on localities and on providers to determine the appropriate, individualized costs or fair market value of the ROW.

These inconsistencies reveal that the only real common denominator in industry's position about ROW compensation is that it be minimal in amount, and/or so expensive or complicated to calculate that local governments will lack the resources to derive the evidence needed to defend the ROW fee they seek to impose.

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[10] *See, e.g.,* Verizon Comments at 39; CenturyLink Comments at 3-4; Level 3 Comments at 1 (quoting *NOI* at ¶ 4); PCIA Comments at 30-32, 48 & 57; NextG Comments at 22-23.
[11] *See, e.g.*, CenturyLink Comments at 18-20; Verizon Comments at 36-37; Level 3 Comments at 9-10.
[12] *Id.* at 10-12.
[13] San Antonio Comments at 15-19; NLC Comments at 57-60; Eugene Comments at 13-18.
[14] *See, e.g., Union Pac. Railroad Co. v. Chicago Transit Authority*, 647 F.3d 675 (7th Cir. 2011) (2.8 mile railroad right-of-way appraised at between $11.3 million and $30.8 million, translating into a monthly rental value of at approximately $90,000).

While industry's desire to minimize ROW compensation is understandable, it is not a principled way either to construe Section 253(c) or to promote broadband deployment.[15] Rather, it is merely a way to transfer the value of public property (the ROW) from local governments and their taxpaying residents to the shareholders and executives of ROW-using broadband providers. And since the record demonstrates that greater ROW compensation is not at all associated with lesser broadband deployment, which is the only principled basis under which ROW compensation could be relevant to the *NOI*'s broadband deployment objectives, the Commission should summarily dismiss industry's ROW compensation arguments.

B. Variable-Cost Forms of Right-of-Way Compensation, Such As Access Line-Based or Gross Revenue-Based Fees, Are Not A Cost of Broadband Deployment at All, and Actually Promote Competitive Broadband Deployment.

Industry's distaste for "revenue-generating"[16] forms of ROW compensation, such as access line-based or gross revenue-based fees, is misdirected for another reason as well. Because access line-based or gross revenue-based ROW fees are a variable cost to broadband providers, and one that is not even incurred until the provider actually is providing service, they are not a cost of broadband deployment at all. They are instead an incremental operating cost of providing broadband service, just like the broadband provider's other recurring operating costs.[17]

Moreover, as an incremental operating cost that varies with the provider's volume rather than a fixed cost or an upfront capital cost of building a broadband network, access line-based

[15] We note that, as pointed out in our opening comments (at 13-15), by its terms Section 253 does not apply to Title I broadband services, and the FCC's ability to exercise its ancillary jurisdiction to extend Section 253 to broadband is questionable at best.
[16] *E.g.*, CenturyLink Comments at 2.
[17] *See* NLC Comments at 8.

and gross revenue-based ROW fees are not only competitively neutral and non-discriminatory; they promote competition by lowering entry costs.[18]

San Antonio's compromise on the ROW compensation issue with a Distributed Antenna Service ("DAS") provider, set forth in our opening comments at 11-12, provides an example. The City originally proposed a per-foot ROW fee, but the provider preferred a gross revenue-based fee, and the City and the DAS provider agreed on the latter.

The point is, again, that industry's complaints about ROW compensation have little to do with lowering broadband deployment costs, or even promoting broadband deployment. They instead have everything to do with industry's desire for the FCC to preemptively lower one of its many operating costs, and thus to have localities and their taxpayers subsidize providers' ROW use, simply because industry (improperly) sees Section 253 as a convenient vehicle, and the FCC as a more friendly forum than courts, to do so. The Commission should spurn industry's transparent and self-serving plea.

C. <u>Industry Misconstrues Section 253.</u>

Industry commenters present several arguments urging that the Commission has wide-ranging authority to construe, and even to adjudicate, Section 253(c) issues. Industry further asserts that the Commission should effectively overrule the courts and construe Section 253 in a way that would remove an industry plaintiff's burden of proving a Section 253(a) "prohibition" with facts, that would affirmatively prohibit discriminatory ROW compensation or management

[18] In this respect, access line-based and gross revenue-based fees stand in stark contrast to the Communication Act's and the Commission's preferred method – auctions based on the highest, up-front, one-time bid payment – for obtaining compensation for the federal public property (the spectrum) that industry providers use. Up-front, lump-sum bidding for public property favors larger (usually incumbent) providers, and because it makes public property compensation a large, upfront fixed cost, deters competitive entry by smaller providers.

requirements without factual proof of prohibitory effect, and that would prohibit some of the very forms of ROW compensation that Congress made clear were permitted.[19]

The many legal flaws of these arguments have already been presented in our opening comments and those of others and need no repetition.[20] Here, we merely point out a few of the more glaring errors in industry's Section 253 arguments.

First, CTIA argues that the Commission should adopt, and adjudicate and enforce, a "shot clock" for the ROW permitting process under Section 253(a). The Commission may do this, according to CTIA, because it did so in the *Shot Clock Ruling*[21] under Section 332(c)(7)(B). CTIA Comments at 37-40. Even if one accepts the validity of the *Shot Clock Ruling*,[22] the shot clocks adopted there were an interpretation of the statutory phrases "reasonable period of time" in Section 332(c)(7)(B)(ii) and "failure to act" in Section 332(c)(7)(B)(v). *Shot Clock Ruling*, 24 FCC Rcd at 14008. Section 253 contains no such phrases at all. CTIA's reliance on the *Shot Clock Ruling* to graft a shot clock on to Section 253(a) is therefore entirely misplaced.

Second, industry commenters urge the Commission to construe Section 253 in ways that would stand its language and legislative history on their head. Verizon (at 34-36), for instance, argues that Section 253(a) should be construed to preempt all ROW fees that are not saved by Section 253(c) without any factual proof at all of prohibitory effect – in other words, to construe Section 253 as affirmatively prohibiting any ROW fee that is discriminatory or not competitively neutral. Level 3 claims (at 23) that the Commission has "authority to adjudicate" Section 253(c) ROW disputes. Both Verizon's and Level 3's claims would render Section 253(c) *and* (d)'s

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[19] *See, e.g.*, Level 3 Comments at 7-14 and 22-31; Verizon Comments at 25-39; CenturyLink Comments at 11-20.
[20] *See, e.g.*, San Antonio Comments at 13-19; NLC Comments at 53-66; NASUCA Reply Comments at 17-21; Eugene Comments at 11-18.
[21] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, Declaratory Ruling, 24 FCC Rcd 13994 (2009) (*"Shot Clock Ruling"), recon. denied*, 25 FCC Rcd 1157 (2010), *petitions for review pending sub nom., City of Arlington, Texas. v. FCC*, No. 10-60039 (5th Cir. filed Jan. 14, 2010).
[22] San Antonio does not. *See* San Antonio Comments at 20.

language, *and* their legislative histories, a nullity. By resurrecting the "parity provision" in Section 243(e) of the original House bill that would have affirmatively prohibited discriminatory ROW compensation,[23] Verizon's reading would reverse the Barton/Stupak amendment on the House floor,[24] and it would rewrite the Senate bill to include a "parity provision," when it had none.[25] Level 3's argument would do likewise, completely undoing the Gorton amendment, which was specifically intended to ensure that ROW compensation disputes take place in the courts, not before the Commission.[26]

Third, Level 3 (at 29-30 & 37) erroneously relies on the Senate floor debate on the Feinstein/Kempthorne amendment and the Gorton amendment as a reliable source for ascertaining the meaning of "fair and reasonable" ROW compensation under Section 253(c). But the Senate debate was *not* about the meaning of "fair and reasonable" compensation at all; it was about the proper forum for deciding ROW compensation disputes (and the Gorton amendment resolved that issue in favor of the courts, not the Commission).[27] The House floor debate on the Barton/Stupak amendment is the only place where the meaning of "fair and reasonable" ROW compensation was debated, and both sides agreed that rental-based ROW compensation was permitted.[28]

Fourth, Verizon (at 30-32) and Level 3 (at 6-8) suggest various ill-defined, and fact-free, ways to construe Sections 253(a)'s "effect of prohibiting" language in the context of ROW compensation. But what they do not mention is far more clear: Section 253(a)'s "prohibitory

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[23] *Compare* H.R. 1555, 104th Cong., 1st Sess., § 243(e) (1995) *with* 47 U.S.C. § 253.
[24] 141 Cong. Rec. H8460-61 (daily ed. Aug. 14, 1995).
[25] *See* S.652, 104th Cong., 1st Sess., § 201.
[26] 141 Cong. Rec. S8308 (daily ed. June 14, 1995) (remarks of Sen. Gorton). *See also BellSouth Telecommunications v. Town of Palm Beach*, 252 F. 3d 1169, 1177 (11th Cir. 2001); *TCG Detroit v. City of Dearborn*, 206 F. 3d 618 (6th Cir. 2000); *Qwest Corp. v. City of Santa Fe*, 380 F. 3d 1258 (10th Cir. 2004).
[27] 141 Cong. Rec. S8305-S8308 (daily ed. June 14, 1995).
[28] San Antonio Comments at 18-19; NLC Comments at 57-60; Eugene Comments at 13-18.

effect" language demands far more than a showing that a ROW compensation or management requirement imposes costs on a provider: If, as the Supreme Court held in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 389-90 (1999), a reduction in a telecommunication provider's profit does not necessarily "*impair*" that provider's "ability to provide service" within the meaning of a companion 1996 Act provision, 47 U.S.C. § 251 (d)(2)(B), then *a fortiori* the mere imposition of a ROW fee on a provider – particularly one that is access line-based or gross revenue-based – cannot be said to have the far more draconian effect of "*prohibiting*" that provider's ability to provide service under § 253(a).

II. THE COMMISSION SHOULD REJECT THE WIRELESS INDUSTRY'S EFFORTS TO STRETCH THE *SHOT CLOCK ORDER* BEYOND ALL RECOGNITION.

Obviously seeking to exploit the *Shot Clock Ruling* and to entice the Commission into stretching § 332(c)(7), and in some cases § 253 as well, still further beyond all recognition, numerous wireless industry commenters urge the Commission to take all manner of preemptive steps with respect to the local wireless zoning process. Even if the *Shot Clock Ruling* was within the Commission's legal authority, however (and we think it was not), the wireless industry's efforts here are a bridge much too far.

We begin with re-emphasizing what the record shows: Wireless broadband deployment, and the number of different wireless providers, is greatest in major urban and suburban areas where zoning requirements tend to be most stringent.[29] That fact alone, but especially when coupled with industry's own evidence of the mushrooming number of cell sites since § 332(c)(7)

[29] *See, e.g.*, LKM Comments at 6-9; Eugene Comments at 6-9; San Antonio Comments at 6-8.

was enacted,[30] defeats most of the wireless industry's claims here. And it underscores that the wireless industry's pleas here are less about broadband deployment than they are about industry's unsurprising, but irrelevant, preference to be freed from having to comply with local laws from which it would prefer to be exempt. The wireless industry is reduced to anecdotes, which, even if accurate, would not amount even to trees, but mere twigs, in a veritable forest of proliferating wireless sites. Certainly, wireless industry commenters offer no factual data even remotely demonstrating that the court remedy provided by § 332(c)(7)(B)(v), especially when coupled onto the *Shot Clock Ruling* (assuming *arguendo* its validity), is insufficient to deal with any problems.

But the wireless industry's renewed assault on local zoning authority suffers many other defects as well.

A. Section 332(c)(7) Is Not a Tool To Be Used By Industry or the Commission To Make Up for Siting Problems Unrelated To Local Zoning Requirements That Industry May Encounter.

AT&T candidly admits that many factors wholly unrelated to local zoning requirements frustrate or considerably delay its ability to obtain additional wireless sites. Examples include the unwillingness of landlords to lease property, landlords demanding excessive rents, and saturation of the area's suitable sites by other carriers. *See* AT&T Comments at 2-3 & 7-13. While the City understands AT&T's frustration, it does *not* accept the conclusion that AT&T seemingly seeks to draw from it: That § 332(c)(7)(B) can somehow be viewed as a conveniently manipulable device for offsetting these other problems – in other words, that local zoning authorities should be compelled to speed up their local zoning processes to "make up" for time

[30] *See, e.g.*, CTIA – The Wireless Association®, *Background on Semi-Annual Wireless Industry Survey* (2010), *available at* http.://files.ctia.org/pdf/CTIA_Survey_Year_End_2010_Graphics.pdf (cell site growth of over 800% from 1996 to 2010).

wireless providers have lost due to unrelated site acquisition factors totally outside the locality's control. "Reasonable period of time" in § 332(c)(7)(B)(ii) is to be determined in light of the nature and scope of the wireless application and how the local zoning authority treats other similar wireless applications.[31] It is *not* to be twisted into a "changeling" shortcut to offset delays or other difficulties providers may encounter due to unwilling or overly demanding landlords of potential wireless sites.

B. Wireless Industry Commenters Improperly Construe Section 332(c)(7).

Several wireless industry commenters urge the Commission to go well beyond the *Shot Clock Ruling*.[32] Industry's proposals generally fall into the categories of allowing wireless facility modification by right, shortening the shot clocks still further for facility modification applications, and deeming applications granted if not acted on within the shot clock.[33] Even some industry commenters, however, appear to concede that at least some of these proposals are beyond the Commission's authority.[34]

And for good reason. Industry's "modification by right" proposal is, in essence, a "zero shot clock" proposal. How that can be squared with § 332(c)(7)(B)(ii)'s "reasonable period of time" language, or with the *Shot Clock Ruling*'s own explanation of that provision, "zero shot clock" proponents do not, and cannot, rationally explain.

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[31] H.R. Confer. Rep. No. 104-458 at 208 (1996), *reprinted at* 1996 U.S.C.C.A.N. 124, 223.

[32] While less clear on this point, CTIA and PCIA also appear to suggest that § 253 may provide an "alternative avenue[]" for challenging local wireless siting requirements. CTIA Comments at 37. *See also* PCIA Comments at 39-40. CTIA and PCIA are mistaken. By its clear language, § 332(c)(7)(A) precludes *any* application of § 253 to any state or local authority over decisions "regarding the placement, construction, and modification of personal wireless service facilities." Section 332(c)(7)(A) likewise bars any reliance on § 706 in the wireless siting context.

[33] *See* PCIA Comments at i and 40-43; CTIA Comments at 27 and 31-33; Verizon Comments at 10-11.

[34] *See, e.g.*, CTIA Comments at 33-34 (FCC should ask state and local authorities to "*voluntarily*" shorten the shot clock for modifications and allow certain modifications by right, and FCC should support Congressional legislation to require localities to do that).

Equally misguided is Verizon's countertextual, indeed Orwellian, proposal for the Commission to construe some kinds of wireless site modifications as not being a "modification" within the meaning of § 332(c)(7) at all.[35] The statute refers to any "modification of personal wireless facilities," *not* to a "material modification to the underlying structure."[36]

Industry proposals to further shorten the existing shot clocks in the case of modification applications miss the mark as well. Industry seems to have forgotten that the *Shot Clock Ruling* itself purported to give reasons for the length of the shot clocks it established, reasons that on their face would not justify shorter shot clocks. *See Shot Clock Ruling*, 24 FCC Rcd at 14009-14013.

Industry's suggestion that applications be "deemed granted" if not acted on before the shot clock expires suffer from the same defect. The *Shot Clock Ruling* itself states that a "deemed granted" approach would be inconsistent with Section 332(c)(7)(B). 24 FCC Rcd at 14009.

Ultimately, the wireless industry's various complaints about the treatment of wireless facilities site modification applications grossly over-generalize about what is inherently an individualized, fact-specific process. A modification of an existing facility could mean increasing its height or width, increasing wind load factors, disturbing the site's existing camouflage, or many other variables. And as noted in the City's opening comments, what an applicant sometimes refers to as a "modification" of an existing facility is really an application for a new, replacement tower, or an effort to overcome a grandfathered non-conforming use. *See* San Antonio Comments at 8-10.

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[35] Verizon Comments at 9-10.
[36] *Id.*

There simply is no "one-size-fits-all" concept of a "modification," and based on the City's experience, there certainly is not in industry's eyes, either. To be sure, municipalities typically do process most collocation applications more quickly than applications for entirely new sites. But land use law is, by its nature, a very fact-specific process, based not only on the specifics of the applicant's proposed structure but also on the surrounding area where the applicant proposes to install the structure. That is true not just in the context of wireless facilities, but in the case of all land use applications. And that is why Congress wisely left § 332(c)(7) to the courts, and why the Commission should intrude no further than it already has in the land use process.

CONCLUSION

For the foregoing reasons as set forth in the City's opening comments, as well as those set forth in other local government comments, the Commission should take no further action and terminate this proceeding.

Respectfully submitted,

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